

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1041

United States Court of Appeals
FOR THE SECOND CIRCUIT

MARIA DIAZ FARO,

Plaintiff-Appellant,

—against—

NEW YORK UNIVERSITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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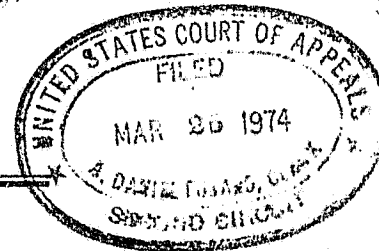


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1, 26, 29

*Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED

1. Whether the district court in denying Dr. Faro's application for a temporary injunction applied the standard approved by this Court.
2. Whether Dr. Faro met the burden of demonstrating a combination of probable success on the merits of her case and the possibility of irreparable harm so as to warrant the extraordinary remedy of injunctive relief.
3. If a lesser alternative test is applicable, whether the balance of hardships tips so decidedly in Dr. Faro's favor and she has met the burden of raising questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and more deliberate investigation than the three day hearing held by the district court.
4. Even assuming that the district court was in error in concluding that Dr. Faro failed to make out a prima facie case of employment discrimination were the University's reasons for considering Dr. Faro ineligible for tenure pretextual.

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1041

.. .. .

MARIA DIAZ FARO, "

Plaintiff-Appellant, "

- against - " " "

NEW YORK UNIVERSITY, "

Defendant-Appellee. "

.. .. .

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

Plaintiff appeals from an order of the District Court denying her application for a preliminary injunction in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq., seeking an injunction against defendant from changing her employment status at the New York University Medical Center, pending action by governmental agencies with whom she had filed complaints. The order was issued not only on the papers filed by the parties but after a three day hearing at which both sides presented evidence.

STATEMENT OF FACTS

The New York University Medical Center (Medical Center) is a division of New York University. The Medical Center consists of the School of Medicine, Post Graduate Medical School, University Hospital and a specialized hospital known as the Institute of Rehabilitation Medicine (Def. Exh. Z p. 5). The faculty of the Medical Schools is divided into departments (Def. Exh. Z p. 42, et seq.) including Rehabilitation Medicine (p. 75) and Cell Biology (p. 43). Among the witnesses who testified on behalf of the defendant University at the hearing on this matter were: Dr. Howard A. Rusk, Director of the Institute of Rehabilitation Medicine and Chairman of the Department of Rehabilitation Medicine in the Medical Schools; Dr. Jacobus L. Potter, Associate Dean of the School of Medicine; Dr. Joseph Goodgold, Professor of Rehabilitation Medicine and Director of Research and Training in the Institute of Rehabilitation Medicine; and Dr. David D. Sabatini, Chairman, since October 1972, of the Department of Cell Biology of the School of Medicine.

The operations of the Medical Center are financed through funds provided by New York University, gifts and grants from private individuals, tuition fees, patient fees and funds from various private foundations and government agencies. Among the latter were several

funds for research activities which were administered by the Department, and the Institute, of Rehabilitation Medicine which supported Dr. Faro's research activities and provided her compensation during most of the period she was employed at the Medical Center.

Dr. Faro is not a medical doctor but holds a Ph.D. from the University of Pennsylvania. She was first employed at the New York University School of Medicine on February 1, 1965 as one of the approximately 14 members of the research staff of the Laboratory of Perinatal Physiology, NINDB, NIH in San Juan, Puerto Rico, brought to New York University by Dr. William F. Windle (Def. Exh. E). Dr. Windle was principal investigator on a federal research grant under which Dr. Faro and others were engaged in primate studies. Thus Dr. Faro came to New York University as a member of a research team to do research in a specialized field. (Tr. p. 4).

In accord with the circumstances under which Dr. Faro came to New York University as a research scientist, her initial letter of appointment (Pl. Exh. 1a) as Instructor of Experimental Rehabilitation Medicine expressly stated that her compensation was "paid from special funds." Each of Dr. Faro's successive letters of appointment for academic years 1965-66 through 1970-71 state after "Compensation", "Paid from special funds"

(Pl. Exhs. 1b, 1c, 1d, 1g, 1h and 1i). The form of University letters of appointment for members of the Medical School staff since the 1971-72 academic year no longer refer to the compensation of the appointee. Accordingly, the letters of appointment Dr. Faro received for academic years 1971-72 and 1972-73 did not include the statement "Paid from special funds", although in fact compensation continued to be paid from special funds (Pl. Exhs. 1e and 1f).

The significance of the notice in letters of appointment that compensation is paid from special funds lies in the provisions of the University's Bylaw 73 (Pl. Exh. 3 p. 24) which states with respect to "Nontenure Positions":

"Instruction or research service shall be without tenure implications of any kind, regardless of rank or title * * * in a program having a subsidy of limited duration."

The application of this Bylaw is amplified in the Statement of Policy in Regard to Academic Freedom and Tenure adopted by the University's Board of Trustees and published in the Faculty Handbook (Def. Exh. T [1961 Edition] p. 22) and (Pl. Exh. 3 [1972 Edition] p. 28) where it is stated:

"All part-time appointees to the University staff, irrespective of title, rank, or cumulative length of service, are entitled to no right of

tenure, and their appointments are limited strictly to the periods stipulated in the official notices thereof. Likewise, all those receiving appointment in such temporary capacities as fellow, assistant, associate, lecturer, or as acting, adjunct, clinical and visiting officers or instruction in the several ranks whether rendering full- or part-time service, are ineligible for tenure on the basis of such service and are restricted in the duration of their connection with the University to the period stipulated in the official notices of appointment.

The same stipulation applies to personnel appointed with professorial or other titles, whether on full- or part-time service, on subsidized assignments such as sponsored research, or in teaching programs where expense of the program is dependent upon a subsidy of limited duration."

(Emphasis added)

Dr. Potter and Dr. Rusk testified with respect to "special funds" referred to in Dr. Faro's appointment letters. Special funds are restricted purpose funds; that is they may only be expended for the purposes for which the grant is made. Generally such funds come from the federal government, such as the "RT-1" Grant, and to a lesser extent state, city and private foundation sources. "Sponsored research" is the usual name for the activities such funds support. (Tr. pp. 145, 151-152, 250-251). As Dr. Faro herself has testified, except for a portion of her salary in the years 1971 and 1972, her salary during her entire employment with the University has been paid either from federal grants for research or from

private foundation grants, also for research.* All of these grants constituted special funds in that they were for restricted purposes and all were of limited duration.

During the period from Dr. Faro's initial appointment in 1965 until at least the latter part of 1970, according to her own testimony, her full time was devoted

*The record indicates the following sources of Dr. Faro's compensation largely from her own testimony and documentary evidence:

1965 (initial year of employment) - National Institutes of Health (N.I.H.) Grant to Dr. William Windle.
Tr. pp. 7, 8 and 144, 145.

1966-67 - Half from a grant from Association of Crippled Children and half from Dr. Rusk's RT-1 Grant.
Tr. p. 8.

1968 through February 1971 - N.I.H. Grant to Dr. William Windle. Tr. p. 8.

March 1971 through August 1971 - Department of Cell Biology Budget. Tr. p. 8 and Def. Exh. Y.

September 1971 through August 1972 - Department of Cell Biology Budget and a general research support grant from N.I.H. to the School of Medicine.
Tr. pp. 8, 220.

September 1972 to date of Hearing in September 1973 - Dr. Faro's research activities were supported during this period and for some time prior thereto by private foundation grants, procured by Dr. Rusk totaling \$170,000 and Department Funds of \$29,000.
Dr. Rusk's testimony - Tr. pp. 147-149.

Dr. Faro's salary at time of the Hearing and for a period prior thereto was paid out of the Medical School's general research support grant. Dr. Potter's testimony - Tr. pp. 220, 250.

to research and related administrative responsibilities. (Tr. p. 113) From October 1, 1966 to September 30, 1968 the primate research activities in which Dr. Faro was engaged were supported in some part by Dr. Rusk's RT-1 funds* (Def. Exhs. K and L) until the federal government requested that such support be discontinued as unrelated to Rehabilitation Medicine. (Def. Exh. N) In 1969 and 1970 support in the amounts of \$800. and \$3,000. respectively were furnished from the RT-1 grant (Def. Exhs. O and P). During the period from 1968 to February 1971 however Dr. Faro's salary was paid from Dr. Windle's grant for study of the effects of Asphyxia-neonatorum in primates. (Def. Exhs. F through H) In 1971 support in the amount of \$1,150. was provided from RT-1 funds for supplies and indirect costs. During this year Dr. Faro's compensation was paid in part from Cell Biology funds and from September 1971 to date from the funds procured by Dr. Rusk from various private foundations for Dr. Faro's continued research activities. (Def. Exhs. Q and R, Pl. Exhs. A-1 through A-6 attached to moving affidavit)

*Dr. Rusk testified that RT-1 was a federal grant to the Institute of Rehabilitation Medicine for Research and Training primarily related to rehabilitation, disabilities, and artificial limbs and their development. The legend RT-1 designated it as the first such Research and Training Grant, given to an institution. (Tr. p. 150)

By 1970, Dr. Windle was winding up his affairs at the University and his grant was scheduled to terminate in February, 1971. All of Dr. Windle's research team, including Dr. Faro, were aware of his intended departure and that his grant would terminate. (Tr. pp. 146-147) Dr. Goodgold testified that the other members of the research team that came with Dr. Windle in 1964-65, either found other positions elsewhere, resigned or were terminated. (Tr. p. 177) The only two members of the research team who continued in the employ of the Medical Center were two women, Dr. Faro and Dr. June Barker, according to Dr. Faro's testimony. (Tr. p. 114) Dr. Faro was well aware that the special funds from which her salary was paid and her research activities were supported were running out and that if she wished to continue at New York University beyond February 1971 she would have to find new sources of support. (Tr. pp. 100-101)

It was under these circumstances that Dr. Faro in October or November, 1970, went to see Dr. Potter, Associate Dean of the Medical School, for assistance. (Tr. p. 211) Dr. Potter questioned her about her background and learned that she had a Ph.D. in Anatomy. Dr. Potter was aware that the Department of Cell Biology was suffering from a shortage of personnel to assist in the teaching of Gross Anatomy, a basic course taught to the entire

first-year class of the Medical School. (Tr. p. 212)

In addition, a change in curriculum the previous year made it necessary to give the Gross Anatomy course a second time in academic year 1970-71 so that both the first year and second year classes could complete the course. (Tr. p. 216) Most of the members of the regular faculty of the Department of Cell Biology who taught the Gross Anatomy course one semester each year could not teach the course again in Spring, 1971 because of other assignments. A decision had already been made to hire faculty from outside the University to have primary responsibility for teaching the Spring, 1971 course. (Tr. p. 217) Dr. Potter, knowing that additional assistants would be needed, discussed Dr. Faro's situation with the Acting Chairman of the Department, Dr. Ross, who contacted Dr. Faro and arranged for her participation. (Tr. p. 213) Formal budget arrangements were made for Dr. Faro's participation in Spring 1971 course at the same time the outside faculty appointments were arranged. (Def. Exh. X) Dr. Potter made it clear to Dr. Faro that the Cell Biology assignment would be a temporary one based on special financial arrangements until Dr. Faro could wind up her research, find another position or procure other research support. (Tr. p. 217)

In addition to the Cell Biology assignment,

Dr. Potter suggested to Dr. Faro the possibility of her assisting in teaching a course in Medical Spanish that Dr. Ockerse, a pediatrician as well as a linguist, had been developing for the University. Dr. Faro expressed a willingness to assist in this course and Dr. Potter recommended her to Dr. Ockerse. (Tr. pp. 213-214) A group of four including Dr. Faro, under the leadership of Dr. Ockerse, taught this special course in Medical Spanish in the Spring semester, 1971, and 1972. (Tr. pp. 94-96) Dr. Faro was not given any additional compensation for her participation in this course, because the assignment was a special arrangement to maintain her salary as an interim measure. (Tr. p. 222)

Dr. Faro also went to see Dr. Rusk for assistance in obtaining funds to continue her research, at the suggestion of Dr. Goodgold with whom she had discussed the implications for her future on the termination of Dr. Windle's Asphyxia-neonatorum grant. (Tr. pp. 178, 147) Dr. Faro explained her situation and emphasized her willingness to take special measures such as cutting staff and working overtime in order to continue her research with primates. Dr. Rusk was impressed by Dr. Faro's dedication to her research. Even though the Institute of Rehabilitation Medicine was operating at a substantial deficit and it was increasingly difficult to obtain funds for research

projects and other researchers were also seeking funds, Dr. Rusk undertook to, and did obtain funds from private foundations for the support of Dr. Faro's research activities for a limited period. (Tr. pp. 148-149) In light of the fact that Dr. Faro had not been successful in obtaining federal or other support on her own initiative, other than a \$10,000. grant in 1969 (Tr. p. 125), it is obvious that Dr. Rusk's success on her behalf was due to his own good will for and sponsorship of Dr. Faro. Thus through the efforts of Dr. Potter in finding special assignments to support her salary and of Dr. Rusk in obtaining private foundation grants to support her research activities for a limited time, Dr. Faro was enabled to continue her employment at New York University beyond the termination of Dr. Windle's grant in 1971 and the departure of her colleagues on that project.

In the summer of 1971, Dr. Rusk wrote letters to eleven employees (at least six of whom were males) in the Department of Rehabilitation Medicine, including Dr. Faro (Tr. p. 152) to clarify that their appointments were not in the tenure chain, terminating their current academic appointments as of August 31, 1972 and offering each a new appointment, specifically without tenure implications. (Pl. Exh. 4 and Def. Exh. U) Dr. Faro was in no way singled out for discriminatory treatment. The letters to

Dr. Faro and to some of the other employees included promotion in rank and all provided for continuation of current salaries and fringe benefits. With the exception of Dr. Faro, all of the staff members receiving such letters - whom Dr. Rusk described as distinguished senior people in the department (Tr. p. 153) - indicated their willingness to accept the new designations (Tr. p. 35, Def. Exh. U). Dr. Faro never had any teaching duties in the Department of Rehabilitation Medicine, all her activities from the time of her initial appointment to the time of the hearing herein being entirely in research. (Tr. pp. 113, 213. Def. Exh. E) The appointments offered by Dr. Rusk to Dr. Faro were thus in no way inconsistent with the realities of her employment in the department and did not entail or imply any demotion or loss of financial benefits.

Some time during 1971 Dr. Faro informed Dr. Goodgold that she wished to have a primary appointment in the Department of Cell Biology and pointed out that she had already assisted in the teaching of a Gross Anatomy course in that department. (Tr. P. 181) She was particularly interested in the Cell Biology appointment since it was a basic science department having graduate students (unlike Rehabilitation Medicine which is a clinical department without graduate students). Dr. Faro indicated that

her purpose in securing the appointment in Cell Biology was to have the assistance of the graduate students in her research thereby stretching her funds for the continuation of the research activities she was engaged in, in the Department of Rehabilitation Medicine. (Tr. pp. 181-182, 223) This purpose is further confirmed by Dr. Faro's statements in paragraph 11 of her moving affidavit.

Dr. Goodgold then took the initiative to draft a letter to the Dean of the Medical School for Dr. Rusk's signature recommending, as Dr. Faro had requested, a transfer for her from Rehabilitation Medicine to the "Department of Anatomy" (actually Anatomy is a division of the Department of Cell Biology) assigned to Rehabilitation Medicine (Def. Exh. V). Unquestionably Dr. Faro's only expressed interest was a peripheral involvement in the Department of Cell Biology incidental to the continuation of her research activities in the Department of Rehabilitation Medicine on her Asphyxia-neonatorum project with primates. (Tr. pp. 61-62, 147-148 and paragraph 11 of moving affidavit) Dr. Faro contends that sometime in this period Dr. Goodgold showed her an alleged letter he had written (Tr. pp. 27, 28 and paragraph 13 of moving affidavit) -- which she admitted on cross examination she never read (Tr. pp. 128-129) -- which she describes in various ways but in substance as purporting to recommend her for promotion to

Associate Professor with tenure in the Department of Cell Biology. The testimony is uncontroverted that only a Department Chairman could recommend promotion or tenure, and then only for a member of his own department. (Tr. pp. 153-154, 228) Neither Dr. Rusk nor Dr. Goodgold would have written a letter to anyone recommending Dr. Faro for promotion in any other department, and they have testified they never did so. (Tr. pp. 153-154, 179) If Dr. Goodgold showed Dr. Faro any letter, it must have been Dr. Rusk's memorandum of October 1, 1971 to Dean Bennett (Def. Exh. V), reflecting yet another occasion when Dr. Rusk undertook to use his good offices on Dr. Faro's behalf. (Tr. p. 183)

At Dr. Faro's request, no action was taken implementing Dr. Rusk's letter of July 29, 1971 (Pl. Exh. 4) while she sought the appointment in Cell Biology. When ultimately Dr. Faro was offered and refused the same assignment she had had in 1971-72 assisting in the Gross Anatomy course she wrote Dr. Rusk on January 29, 1973 (Pl. Exh. H in her moving affidavit) acknowledging receipt of his letter of July 29, 1971 and requesting consideration for a tenured position. In a subsequent conversation in early February 1973 Dr. Goodgold advised Dr. Faro that financial and academic considerations precluded such consideration. He further told her that it did not matter whether she signed a letter accepting the July 29, 1971 change of appoint-

ment. (Tr. p. 185)

Dr. Faro complains that she was never considered for "promotion and tenure" by the University. She was promoted from Assistant Professor to Associate Professor as of September 1972. (Tr. p. 140) The fact is that the nature of her employment as a researcher and her appointments with compensation paid from "special funds" did not qualify her for consideration for tenure and Dr. Faro was on notice as to that fact. (Pl. Exh. 1a - 1d, 1g - 1i, Def. Exh. T p. 22, Pl. Exh. 3 pp. 24 and 28) Admittedly Dr. Faro never had any teaching responsibilities in the Department of Rehabilitation Medicine but her activities were limited to sponsored research. The extent of her activities in other than sponsored research was the part time work over a period of only three semesters as an assistant in the Anatomy Laboratory and teaching a special non-departmental course in Medical Spanish. The most that Dr. Faro can contend is that this period should be considered as being in the tenure chain so that she would have achieved substantially less than the eight years of service in the tenure chain required by the University's Bylaws for granting of tenure. (Pl. Exh. 3 p. 29, paragraph 5)

Dr. Faro claims discrimination in not having been offered a primary appointment as a full-time faculty

member of the Department of Cell Biology, but the facts do not support this claim. Dr. Faro's teaching assignment for the Gross Anatomy course in Cell Biology was a temporary assignment based on special budgetary arrangements, whether for two semesters or, as claimed by her, three semesters.

Dr. Faro testified that during the period from November 1970 through February 1971 she was spending approximately two and one-half days per week on Gross Anatomy, including preparation time of two to three afternoons a week to review because she "had been away from Anatomy quite a long time." (Tr. pp. 84-85)

In the period from February through May 1971 Dr. Faro was assisting a group of Doctors from New York Medical College hired to teach a special course during that semester in Gross Anatomy. (Tr. pp. 86-87) In particular she assisted Dr. Emmanuel Alves. (Tr. p. 88) During this period, Dr. Faro testified that she spent approximately two and one-half days per week on Gross Anatomy. (Tr. p. 93) She only participated in the laboratory sessions on two of the four afternoons they were scheduled. On the other two afternoons when the laboratory sessions were scheduled she was teaching Medical Spanish. (Tr. p. 91) According to Dr. Faro she spent approximately one and one-half days per week teaching or preparing

Medical Spanish during this period. (Tr. p. 99)

From September, 1971 through February, 1972 Dr. Faro testified that she spent two and one-half days per week teaching Gross Anatomy. (Tr. p. 94) She did not teach Medical Spanish in the Fall semester. In the Spring semester, the Medical Spanish course was given and Dr. Faro taught that course along with Dr. Ockerse and some other faculty from March 6, 1972 until the end of May, 1972. During this latter period she spent one and one-half days per week teaching. (Tr. pp. 95-96)

The balance of Dr. Faro's time during these periods from November, 1970 to May, 1972 was spent on research in the Department of Rehabilitation Medicine. Thereafter Dr. Faro had no teaching assignments at the University and she continued solely in her research activities. Dr. Faro also testified that in 1970 she spent about 25 percent of her time in teaching and 75 percent in research, in 1971 about 75 percent teaching and 25 percent research and in the Spring of 1972 about 25 percent teaching and 75 percent research. (Tr. pp. 98-99)

Thus, during the entire seven and one-half years of Dr. Faro's association with the University, it was only for one semester - Spring, 1971 - from February through May, that the majority of her time was spent in teaching. Moreover, her total teaching experience in Gross Anatomy

(medical) was as an assistant in the dissecting room for two and one-half days per week during three semesters - Fall, 1970; Spring, 1971; and Fall, 1971; and an undetermined number of days in 1961 in Gross Anatomy (dental) at a time when she was a pre-doctoral trainee. (Def. Exh. E) It was on the basis of this limited "teaching" experience that Dr. Faro sought a full-time appointment in the Department of Cell Biology while continuing her primate research activities outside that Department.

In the latter part of 1971 Dr. Potter met with Dr. Faro with regard to Dr. Rusk's letter of October 1, 1971 to Dean Bennett (Def. Exh. V) concerning her request for a transfer to the Department of Cell Biology. Dr. Potter advised her he did not wish to take any action on her request until the new Chairman of the Cell Biology Department, Dr. David Sabatini, assumed his duties. (Tr. p. 28)

Although Dr. Sabatini was not scheduled to join the University until September, 1972 Dr. Potter did discuss Dr. Faro's request with Dr. Sabatini in the Spring of 1972. Dr. Sabatini told Dr. Potter he would certainly consider Dr. Faro's request and did discuss the possibility with other members of the Department and with Dr. Faro. (Tr. p. 224) Dr. Sabatini knew Dr. Faro was interested in research and asked her if she were interested in research

in Cell Biology. She told him that she had an active plan of research in Rehabilitation Medicine which she wanted to continue. She also indicated that she wanted to participate only in the Gross Anatomy course (which is given only one semester in each academic year), and not in other work of the Cell Biology Department. (Tr. p. 62) It is also apparent from Dr. Faro's testimony that in her conversation with Dr. Sabatini she was seeking a tenured appointment in the Department of Cell Biology. (Tr. p. 29) Dr. Sabatini concluded that he could only offer her a position at the same level she had previously participated in the department -- as a part-time instructor at the same salary paid other such part-time instructors, \$4,000. It was Dr. Sabatini's judgment that Dr. Faro's insufficient teaching experience in Anatomy (Tr. p. 77), lack of interest in research pertinent to Cell Biology and unwillingness to devote full time to the department precluded a full-time primary appointment for her in Cell Biology. (Tr. p. 62)

Dr. Faro has asserted that "within the past two years, on at least two occasions, jobs have fallen vacant in the Medical School for which she was qualified and for which she was recommended." (Complaint paragraph IV [b]) Dr. Faro has also asserted that in February "Dr. Emmanuel Alves was appointed to teach Gross Anatomy in the Department of Cell Biology at an annual salary of \$23,000 -- the

very position I was offered at \$4,000 per year!" (Moving affidavit, paragraph 16) This statement correctly deserves an exclamation, but only because of the extent of its variance from the facts. Dr. Alves was initially hired as one of the visiting faculty from the New York Medical College brought in to teach the special Spring, 1971 Gross Anatomy course in which Dr. Faro assisted, through Dr. Potter's special arrangements. (Tr. p. 228) When Dr. Alves was hired as a full-time adjunct Associate Professor commencing February, 1972, his appointment was for responsibilities extending far beyond a primary role -- by contrast with Dr. Faro's assisting role -- in the teaching of Gross Anatomy, including the actual revamping of the course, preparation and delivery of new lectures, and the preparation of a special board review course. (Tr. pp. 51-52) The testimony and the evidence is overwhelming that there was no professional comparison between Dr. Faro and Dr. Alves in the field of Anatomy. (Tr. pp. 51, 77 and 241-243 and Def. Exh. A and E) She was and is simply not qualified to serve in the capacity in which Dr. Alves served. (Tr. p. 77)

The fact is that Dr. Faro was not recommended for any specific position or appointment in Cell Biology, but only for a transfer from an assignment in Rehabilitation Medicine to Cell Biology (Def. Exh. V). (This is

not a situation comparable to Gilllin v. Federal Paper Board Co., Inc., 479 F.2d 97 [2d Circuit 1973] where the employer refused to consider plaintiff's application expressly because she was a woman.) Dr. Faro was considered for such a full-time appointment, but was not accepted for reasons relating to her teaching experience and focus of research. There is no testimony and no evidence that Dr. Faro's sex had any relationship whatsoever to Dr. Sabatini's decision not to offer her a full-time appointment in the Department of Cell Biology.

The Department of Cell Biology added a new full-time faculty member who began teaching in the Fall of 1973, Dr. James L. Shafland. Dr. Shafland had been an assistant Professor at Duke University Medical Center from 1969 to 1973. He was a teacher (as distinguished from a research scientist) in Medical Gross Anatomy and Gross Comparative Anatomy and had been cited for teaching excellence in this field at Duke University. His activities and publications were centered on anatomy and of special significance was his co-authorship of a 300 page teaching manual of Gross Anatomy. (Def. Exhs. C and D)

Dr. Sabatini first discussed Dr. Shafland's appointment with Dr. Potter in the Fall, 1972 -- several months after he had considered Dr. Faro for a full-time appointment. (Tr. pp. 243-244) Like Dr. Alves, Dr.

Shafland was given an adjunct appointment; that is, an appointment without tenure implications. (Tr. p. 58)

By contrast Dr. Faro was seeking an appointment with tenure which involves a financial commitment for the University lasting until the age of retirement.

Dr. Faro asserted that the University is seeking a man to succeed Dr. Alves who resigned in the Summer, 1973 effective August 31, 1973. (Moving affidavit par. 27, Complaint par. IV [b]) There is no foundation for this assertion, and Dr. Faro did not even attempt to offer any evidence or testimony to support this allegation. Dr. Sabatini testified that the department is not seeking additional faculty members but "decided to go with these people we have." (Tr. p. 59)

At the end of January, 1973 Dr. Faro wrote to Dr. Rusk acknowledging receipt of his July 29, 1971 letter (Pl. Exh. 4) and requesting consideration for a full-time faculty appointment in Rehabilitation Medicine with tenure implications. (Exh. H of moving affidavit) The letter referred to Dr. Faro's negotiations for a Cell Biology appointment* which, by that time, had not been

*It should be noted that even while Dr. Faro contended that she was discriminated against in not receiving the full time appointment in Cell Biology given to Dr. Alves and Dr. Shafland, at the time of their hiring Dr. Faro was still committed to the research activities in the Department of Rehabilitation Medicine including those for which Dr. Rusk had procured private foundation grants on her behalf.

successful and expressly recognized "the tremendous financial obligations that my work entails" -- obviously referring to her research.

Following conversations with Dr. Goodgold and Dr. Rusk in early 1973, Dr. Faro was advised by letter dated March 23, 1973 that her appointment to the staff and faculty would have to terminate December 31, 1973 because of the financial crisis. (Pl. Exh. 5) The critical situation with respect to research funds was indicated in Dr. Rusk's memorandum of October 27, 1972. (Pl. Exh. 2.b) As previously indicated, by 1973-74 the deficit for the Department of Rehabilitation Medicine was \$500,000. The Department no longer has the funds available and Dr. Faro has not succeeded in raising new funds, to support the tremendous financial obligations of her research. (Tr. p. 154)

At the beginning of August, 1973 Dr. Faro met with Dr. Bennett, Dean of the Medical School, and Dr. Potter. Dr. Bennett and Dr. Potter discussed with her the University's grievance procedure which was available to her to pursue any complaint that she had. (Tr. p. 227) During the meeting, Dr. Faro again referred to a purported letter recommending her for promotion to Associate Professor with tenure in the Cell Biology Department. After checking the records, and conferring with Dr. Goodgold, Dr. Bennett

and Dr. Potter concluded not, as Dr. Faro claimed, that there was a letter missing from the files, but that there had never been any such letter; the only letter of recommendation was Dr. Rusk's letter recommending her transfer (Def. Exh. V). (Tr. p. 228)

Dr. Faro claims that she has been a victim of sex discrimination, yet all the testimony and evidence demonstrates that administrative officers and faculty of the Medical Center went out of their way to assist her and to find means whereby her employment and research at the University could be continued until financial circumstances prevented further continuation. Dr. Faro was not recommended and not considered for tenure because she was not eligible for such consideration; she was recommended and considered for promotion within the Department of Rehabilitation Medicine, and she was promoted: from Assistant Professor (Experimental) to Research Associate Professor and Research Scientist. Dr. Faro's request for a full-time appointment in the Department of Cell Biology was also considered. Her sex had no bearing on her failure to receive such an appointment.

ARGUMENT

POINT I

THE DISTRICT COURT APPLIED THE APPROPRIATE STANDARD IN DETERMINING THAT THE INJUNCTION SHOULD NOT ISSUE, AND ITS DETERMINATION SHOULD BE AFFIRMED.

This court has most recently stated the standard which governs the issuance of a preliminary injunction in Pride v. Community School Board of Brooklyn, N. Y. School Dist. #18, 482 F.2d 257 (2d Cir. 1973).

"We repeatedly have emphasized the heavy burden on a party seeking the extraordinary remedy of preliminary injunctive relief. The standard that has evolved is that the moving party 'assume [s] the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that [it has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in [its] favor.' Stark v. New York Stock Exchange, 466 F.2d 743, 744 (2d Cir. 1972) (emphasis added); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969)." 482 F.2d at 264.

The court specifically noted the appropriateness of this standard in cases having a strong public interest in the outcome of the dispute, as in Pride, a class action alleging violation of the equal protection clause of the Fourteenth Amendment; Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973), a securities case alleging anti-trust and securities law violations; and Exxon Corp. v. City of New York,

480 F.2d 460 (2d Cir. 1973), in which certain oil companies sought declaratory and injunctive relief against New York City's enforcement of environmental regulations restricting lead content in gasoline.*

The standard set forth in Pride was the very standard which the court below considered and applied in its determination that a preliminary injunction should not issue. (Op. pp. 11, 12) The District Court was mindful of this court's recent holdings with respect to preliminary injunctions, as in Gulf & Western and Exxon, as well as its earlier opinions such as Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953). Dr. Faro has argued that the court below applied too stringent a standard, while the E.E.O.C. in its amicus curiae brief argues that the District Court applied an improper standard in denying a preliminary injunction. Yet, this court in Pride specifically rejected a suggestion that the standard it has enunciated may be inapplicable in a civil rights case once a prima facie showing of discriminatory effect has been made:

*The University concurs that Title VII legislation embodies a strong public interest in prohibiting discrimination in employment, but disputes Dr. Faro's apparent contention that a mere allegation by a single individual of employment discrimination ipso facto and without even a prima facie showing of discrimination imbues her claim with sufficient public interest to overcome failure of proof.

"While that Rule [shifting of burden of proof after a prima facie showing of discrimination] may be relevant in evaluating a plaintiff's likelihood of success at trial, it does not change the basic equation by which a motion for preliminary injunction is assessed. We therefore see no reason to apply any different standard in a civil rights or other constitutional action than in any other case at this procedural stage. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 20 (2 Cir. 1971)." 482 F.2d at 264, n. 9.

In the case at hand, Dr. Faro failed even to establish a prima facie case of discrimination whether considered in light of the traditional test or the alternative test of the Pride standard. The court below in refusing the preliminary injunction, specifically found that she has failed to show either irreparable harm or the likelihood of success on the merits (Op. p. 18) but also that she has failed to raise such "substantial and difficult" questions as to warrant application of that alternative test. (Op. p. 12)

This court has stated in Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319, cert. denied, 394 U.S. 999 (1969) the applicable principal to be followed by an appellate court in reviewing a decision denying an application for the extraordinary relief of a preliminary injunction.

"An application for a preliminary injunction is most frequently addressed to the judicial discretion of the district court. 7 Moore's Federal Practice, ¶ 65.04, at 1625 (2d ed. 1966). A clear abuse of discretion in such cases, not present in this case, must be shown to an appell-

ate court in order to obtain a reversal of the trial court's denial of temporary injunctive relief. Dino De Laurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 374-375 (2 Cir. 1966); Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2 Cir. 1966); Moore, supra at 1626." 405 F.2d at 323.

The District Court's decision was, in no way, an abuse of discretion and its determination should be affirmed.

POINT II

DR. FARO HAS FAILED TO MEET THE BURDEN OF DEMONSTRATING A COMBINATION OF PROBABLE SUCCESS AND THE POSSIBILITY OF IRREPARABLE INJURY.

The traditional test for a party seeking a preliminary injunction is to demonstrate a combination of a clear showing of probable success and possible irreparable injury. Pride v. Community School Board of Brooklyn, N.Y. School Dist. #18, supra, p. 264. Dr. Faro not only failed to demonstrate such combination but failed to demonstrate either probable success or irreparable injury, which will be separately discussed below.

A. FAILURE TO DEMONSTRATE PROBABLE SUCCESS.

Dr. Faro has failed to make the requisite showing of a strong likelihood of probable success on the merits because first and foremost she has failed as the court found to meet the criteria for a prima facie case of

discrimination. (Op. p. 13) All the evidence -- including most importantly, Dr. Faro's own testimony -- supports this finding and in no way contradicts it.

The parties are in agreement that under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq. as amended, 86 Stat. 103 (March 24, 1972), the criteria for establishing a prima facie case are those set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1824 (1973). As restated by Dr. Faro (Brief for Appellant, p.32) and accepted by the District Court (Op. pp. 12, 13), the applicable criteria are:

1. that she belongs to a class protected by Title VII;
2. that she applied for a job for which she was qualified;
3. that she was not considered or was rejected for the job; and
4. that the employer continued to seek applicants from men of comparable qualifications.

The court below specifically concluded that Dr. Faro failed to meet these criteria, because she had so circumscribed her requirements and availability in applying for a position in the Department of Cell Biology that there was no such position available for her or for anyone (Op. pp.

13-14).

The evidence referred to more specifically in our Statement of Facts, overwhelmingly established what the District Court found -- that Dr. Faro wanted an appointment with tenure (Op. p. 7); that she was not interested in Cell Biology research, but wanted to devote a maximum of her time to continuing her research in the Department of Rehabilitation Medicine (Op. pp. 7, 18); that she wanted to teach only one course in the Cell Biology Department for one semester of the academic year, yet sought a full salary from that department (Op. pp. 7, 17-18); and that she wanted to use Cell Biology Department graduate students to assist in her research with primates. (Op. p. 7) Dr. Sabatini testified that he did discuss with Dr. Faro her request for a Cell Biology appointment (Tr. p. 61). In light of her requirements, Dr. Sabatini concluded he could only offer her the same assignment she had had previously as an assistant in the Gross Anatomy course, which she refused. The District Court specifically found that this offer of \$4,000 was for a salary comparable to that offered males for the same service (Op. pp. 8, 18).

Dr. Faro argued that she was offered the \$4,000 for the same job for which Dr. Alves was paid \$23,000. With respect to this argument, the District Court said: "I find, however, that plaintiff was mistaken, if not mis-

leading, in stating that it was the same job." (Op. p. 17) The District Court found that both Dr. Alves and Dr. Shafland, the two males whose positions Dr. Faro claims she should have been considered for and given, were both hired as adjunct faculty - appointments without tenure implications - and that at least part of the reason for making such appointments was the Medical School's financial condition (Op. p. 13). The District Court further found that both Dr. Alves and Dr. Shafland received positions which required that they devote all their time, effort and research to the Department of Cell Biology (Op. p. 13). The court declined to make a specific finding with respect to Dr. Faro's qualifications for a Cell Biology appointment. It is clear from the entire record, however, without even considering the question of credibility of witnesses, that both Dr. Alves and Dr. Shafland were exceptionally well-qualified to take over primary responsibility for teaching Gross Anatomy. (Def. Exhs. A, C and D., Tr.pp. 51, 59-60) By comparison Dr. Faro's teaching experience in any subject, including Gross Anatomy, was minimal in time and had been rendered as an assistant, while her research interests lay outside the field of Cell Biology: she admittedly "had been away from -- from anatomy quite a long time" (Tr. p. 85).

Dr. Faro claims the District Court completely

misinterpreted the record in finding that she wanted a Cell Biology appointment only upon specified terms and conditions. Dr. Faro ignores her own testimony with respect to her discussion of tenure with Dr. Sabatini. (Tr. p. 29) She further miscites the District Court's finding (with respect to her request for a transfer to Cell Biology [Op. p. 6]), as supporting her present position that she was actively pursuing an appointment without tenure in Cell Biology. If Dr. Faro was not pursuing an appointment with tenure in Cell Biology, she should have been content to accept her new appointment in Rehabilitation Medicine, without any tenure implications. Dr. Faro admits that in Spring, 1972 when she discussed the possibility of a Cell Biology appointment with Dr. Sabatini, the incoming chairman of the department, she wanted to continue her Rehabilitation Medicine research, but now states that the only conditions she was specifying in Spring, 1973 were a position in the tenure chain with a full-time salary. (Brief P. 46) Dr. Faro conveniently ignores the fact that in her January 29, 1973 letter to Dr. Rusk (Exh. H to Plaintiff's Affidavit), she refers specifically to the "tremendous financial obligations that my work entails," clearly indicating she wished to continue her research with primates. Dr. Faro's continued insistence on an appointment leading to tenure involving a life-time financial

commitment, when concededly the financial obligations of her work were tremendous and the Medical School's financial condition was dire, substantiates the District Court's findings with respect to her request for a Cell Biology appointment.

Having been unsuccessful below in establishing a prima facie case of discrimination with respect to her request for a position in Cell Biology, Dr. Faro now claims on appeal to have established a prima facie case of discrimination within the same McDonnell Douglas criteria on the grounds that she was not considered for tenure. Dr. Faro never claimed that she was discriminated against by reason of her sex when she received Dr. Rusk's July, 1971 letter notifying her of the termination of her appointment as Assistant Professor and her promotion to Research Associate Professor (part-time) and Research Scientist (full-time) and clarifying her appointment as one without tenure implications (Pl. Exh. 5). Nor can she reasonably make such a claim now. Most of the recipients of this letter - practically identical with the one Dr. Faro received - were men. The evidence is clear that the others in the department who received this notice accepted re-appointment without any tenure implications, and did not find such appointments demeaning. (Def. Exh. U and Tr. p. 153)

The District Court's finding that Dr. Faro had never been entitled to consideration for tenure by the nature of her work at the University and the terms of her appointment is amply supported by the evidence including her appointment letters (Pl. Exh. 1a - 1d and 1g - 1i) and the University's Bylaws and Statement of Policy in Regard to Academic Freedom and Tenure (Pl. Exh. 3 pp. 24 and 28; Def. Exh. T p. 22).

Dr. Faro never performed any teaching duties in Rehabilitation Medicine. (Def. Exh. E, Tr. p. 312) The District Court found that apart from assisting in the teaching of Gross Anatomy and Medical Spanish, Dr. Faro's work had basically always been either in a program having a subsidy of limited duration or sponsored research. (Op. p. 16) As Dr. Rusk testified, his letter of July, 1971 to Dr. Faro and other members of his department came about as a result of a policy decision to clarify appointments so that designations corresponded to the realities of their work. (Tr. p. 152)

Dr. Faro cannot make out any prima facie case of discrimination by virtue of the fact that she was not considered for tenure since she has offered no evidence to establish that she was eligible or "qualified" for such consideration, either on the basis of her appointment as governed by University regulations or on the basis of her

actual work.

Dr. Faro claims that the District Court misunderstood the issues presented in the case, implying that the court was requiring her to prove an intent to discriminate on the part of the University. (Brief for appellant p. 24) What the court below said was that it could not issue a preliminary injunction on the basis of affidavits only and that it would require Dr. Faro to make a showing beyond the mere allegation that she was a member of a protected class under Title VII and that she had not obtained a particular job.

While it is true that there is no requirement that discriminatory motive on the part of an employer be proved, an unlawful motive may be important as the basis for relief in and of itself. Pride v. Community School Board of Brooklyn, N. Y. School Dist. #18, supra, p. 265. The District Court specifically found that the University was not motivated by sex bias or discrimination in refusing to give Dr. Faro a full-time Cell Biology appointment on the terms and conditions she specified. (Op. p. 14) The court further found that in all respects the University has treated Dr. Faro fairly. (Op. p. 18)

B. FAILURE TO DEMONSTRATE IRREPARABLE HARM.

As previously discussed the moving party on an application for a temporary injunction must, as one of two alternative tests, meet the burden of proof of both probable success and irreparable harm. While the District Court in its opinion did not dwell on the question of irreparable harm it did find "the plaintiff has failed to show either irreparable harm or the likelihood of success on the merits * * *." (Op. p. 18)

While the finding of "no likelihood of success" was sufficient to deny Dr. Faro's application under this test we will briefly comment on the question of irreparable harm. The most recent pronouncement on this subject is the Supreme Court's opinion in Sampson v. Murray, 42 U.S.L.W. 4221 (U.S. Feb. 19, 1974).

In Sampson, as in this proceeding, the plaintiff urged that her discharge would deprive her of income and cause her to suffer the embarrassment or stigma of being wrongfully discharged before pending administrative proceedings could be completed. As the Supreme Court pointed out there, and as is equally true here, the mandatory retention of the plaintiff would provide the most extensive relief which she might conceivably obtain from the agency after its review on the merits and in any event she would receive full back pay and benefits if it was finally

determined that she was wrongfully discharged.

In commenting on the necessity of establishing irreparable injury in Sampson the Supreme Court stated at 42 U.S.L.W. 4229, 4230:

"We believe that the Court of Appeals was quite wrong in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury. This Court has stated that

'the basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies'

Beacon Theatres, Inc. v. Westover, 369 U.S. 500, 506-507 (1959), and the Court of Appeals itself in Virginia Petroleum Jobbers, supra, has recognized as much. * * * The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief. We disagree.

"Even under the traditional standards of Virginia Petroleum Jobbers, supra, it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. In that case the court stated:

'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'

The court then concluded at 42 U.S.L.W. 4231:

"Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case. We therefore reverse the decision of the Court of Appeals which approved the action of the District Court."

In any case involving loss of employment, of course loss of pay is involved. In the case of Dr. Faro, however, the circumstances of her termination due to lack of funds presents no basis for her contention that any stigma or embarrassment was attached to it. The record clearly indicates that financial exigencies as well as the inability of Dr. Faro or others to procure continued support for the research activities she wished to pursue necessitated the University's action. Even Dr. Rusk's termination letter of March 23, 1973 (Pl. Exh. 5) substantiates this and militates against any suggestion of stigma attached to Dr. Faro's termination:

"As you know, this action is most regrettable since I have always been impressed with your work and your personal and professional integrity. This solution is solely reflective of the fiscal crisis which has necessitated center wide program curtailment.

"If there is any way I may be of help in your efforts to secure a new position my complete assistance is available."

How unlike the situation in Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D.Pa. 1973)

where the court found:

"Her ability to get a job will certainly be impaired because of inability to secure recommendations from her present employers." 359 F. Supp. at 1009.

Also unlike Johnson, Dr. Faro had no ongoing research grants which the University was terminating prior to their conclusion. Id. at 1004. In fact Dr. Faro conceded that other than one grant for \$10,000. in 1969 she was unsuccessful in procuring any grants of her own. (Tr. p. 125) As the court found (Op. pp. 3-4) and the record abundantly supports it was due to the special efforts of the University that Dr. Faro was continued in her employment after 1971 when most of her colleagues in her area of research departed.

POINT III

DR. FARO HAS LIKEWISE FAILED TO RAISE SERIOUS QUESTIONS GOING TO THE MERITS AND TO SHOW THAT THE BALANCE OF HARDSHIP TIPS SHARPLY IN HER FAVOR.

The alternative test of the preliminary injunction standard as stated in Pride v. Community School Board of Brooklyn, N. Y., School District #18, supra, requires of the moving party "that [it has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in its favor." 482 F.2d at 264 (emphasis added).^{*} In Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), this test was stated as follows:

"To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

* As with the "traditional test", there are two branches of the alternative test, both of which must be satisfied by the moving party. See, e.g. Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1196 (2d Cir. 1971), a trademark infringement case in which the alternative test, (then referred to by this court as the "Hamilton - Semmes" test) was applied.

After discussing the resolution of the question of "serious issues" the court continued:

"There remains the question whether the judge -- assuming, as he did, for the time being, that the complaint was not without merit -- went outside the bounds of his discretion in ordering a preliminary injunction. * * * The judge must consider whether irreparable harm is likely to result to plaintiff if pendente lite (i.e., 'immediately') the injunction is denied, and against this harm he must balance the harm to defendant likely to result if the relief is granted." Id at 742-743.

Similarly in Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1205 (2d Cir. 1970) this court considered the "balance of hardships" predicated on a determination first that the moving party had shown irreparable injury.

In Pride, supra, this court commented on its role on appeal with respect to the alternative test for a preliminary injunction:

"Finally, in reviewing the district court's denial of the motion for a preliminary injunction, we must consider whether the balance of hardships tipped so sharply in favor of the moving party, the appellants, as to have warranted the grant of preliminary relief. The question here is not as simple as assessing which party stands to suffer more from the grant or denial of the injunction. What is involved is an evaluation of where the equities lie, considering in addition to the hardships such factors as the uncertainty of the questions raised and the probable outcome of the dispute on the merits.

"In the present case, an examination of the balance of hardships necessarily involves many of the same elements referred to in our

discussion of whether irreparable harm had been shown. We shall not repeat them here.
* * * " 482 F.2d at 270.

It is likewise true in this case that many of the same elements referred to by the district court in its discussion of the failure to show probable success and the lack of irreparable harm were pertinent to its determination as to the applicability of the alternative test.

The district court was well aware of the position taken by this court in Gulf & Western Industries, Inc. v. Great A. & P. Tea Co., Inc., 476 F.2d 687, 692 (1973) (affirming Judge Duffy's issuance of a preliminary injunction): "Recently we have emphasized the importance of demonstrating on a preliminary injunction motion the presence of serious questions going to the merits which warrant further investigation and trial." After setting forth his findings of fact, discussing the two alternative tests of the preliminary injunction standard as evolved in this Circuit and indicating his awareness of the basic purpose of a preliminary injunction to maintain the status quo, the district judge concluded that the questions presented were not so substantial and difficult as to warrant the application of the second test. (Opinion pp. 11, 12) The district court did not specifically address itself to the question of hardship tipping. It is clear it did not do so because of its conclusion that Dr. Faro had failed

to raise questions serious enough to necessitate such a discussion. Yet, it is also clear from the district court's opinion, that in arriving at that conclusion, it did make " * * * an evaluation of where the equities lie, considering in addition to the hardships such factors as uncertainty of the questions raised and the probable outcome of the dispute on the merits." Pride, supra, at 270.

In reaching its conclusion, the court was not relying only on affidavits and other papers; it had had the benefit of a three day hearing on this matter. The court specifically noted that various parts of Dr. Faro's testimony raised "serious questions as to her total credibility." (Opinion p. 5)* The court made specific findings that the University had not acted with any discriminatory intent toward Dr. Faro, that it was presently undergoing a period of difficult financial strain, that it had endeavored to aid her in securing employment in the University and elsewhere and in fact had treated her "in a manner that was above reproach." (Op. pp. 9, 18)

*By comparison, in Gulf & Western Industries, Inc. v. Great A. & P. Tea Co., Inc., 356 F. Supp. 1066 (S.D.N.Y. 1973), Judge Duffy said: "The claimed violations of anti-trust law certainly cannot be considered a sham. Thus it follows that the tender offer does raise serious questions under the anti-trust laws." 356 F. Supp. at 1071.

Even if it were necessary to give further consideration to the hardship question the record would not support a finding that the "balance of hardship tips decidedly toward plaintiff."

On the one hand Dr. Faro faced the loss of salary which would be restored to her if she were to be eventually successful in her discrimination claim. This hardship is subject to some amelioration by the fact that partial employment was available to her in the University's Anatomy Laboratory, or in the absence thereof, payment of unemployment insurance was available from the University. The University's burden was the continuation of Dr. Faro and a research staff, laboratory facilities and primates in a project for which it had, and could secure, no further funds and which concededly "entailed tremendous financial obligations."

At the commencement of this proceeding the parties had already agreed to and had phased out Dr. Faro's research project (letter March 23, 1973, Dr. Rusk to Dr. Faro - Pl. Exh. 5). The contention can therefore hardly be made that a preliminary injunction compelling continuation of such research would have maintained the status quo.

POINT IV

DR. FARO'S ARGUMENT THAT THE UNIVERSITY'S FAILURE TO CONSIDER HER FOR TENURE WAS PRETEXTUAL IS WITHOUT FOUNDATION AND CONTRARY TO THE RECORD.

After hearing extensive testimony on this subject in the three day hearing, and review of the documentary evidence submitted relating to the University's tenure policy, the District Court properly determined that Dr. Faro was not in the tenure line. This was based upon the University rules of tenure and particularly Bylaw 73, cited by the court. (Op. p. 16)

"That by-law explicitly states:

'Nontenure Positions. Instruction or research service shall be without tenure implications of any kind, regardless of rank or title, if rendered . . . in a program having a subsidy of limited duration' (Emphasis added)"

The record clearly indicates by testimony on behalf of both parties that Dr. Faro was entirely engaged in research service in programs having subsidies of limited duration, from her initial employment in 1965 to the date of hearing, with the exception of a period of not in excess of one and one-half years during the time the University was making every effort to procure additional funding for her research and providing temporary employment for her in the Anatomy Laboratory and in teaching Medical Spanish. She was thus nowhere near completing

the eight years of full-time teaching in the tenure chain required of an associate professor to achieve tenure under the University's rules. (Pl. Exh. 3 p. 29 par. 5)

The appellant apparently would have this court believe that the record indicates that the University tenure rules were not applied equally to male and female faculty members. The unsupported statements are made at page 32 of appellant's brief that "* * * the evidence shows that most faculty members, including those with tenure, also are paid from grants. Therefore the School's reason is pretextual."

The University admits and its witnesses fairly testified that many members of the faculty of the Medical School tenured and untenured, devote part of their time to research and they are partly compensated from such sources. Appellant, however, refuses to recognize that the tenured faculty to which she refers, unlike Dr. Faro, achieved their tenure through teaching and not as researchers whose support and salary was dependent alone on subsidized programs of limited duration.

Dr. Rusk testified at length on cross examination with respect to the nature of the services performed by various tenured faculty members, including some of those referred to at pages 34 and 36 of appellant's brief. This testimony was to the effect that such faculty spend vary-

ing amounts of time in formal teaching, patient services and research. The patient services constitute a part of teaching "because that's the way residents learn." (Tr. p. 165) Dr. Gertler spends approximately half his time in teaching and half in research. (Tr. p. 165) Dr. Goodgold is "one of the greatest teachers of electromyography in this country. He also teaches * * * the role of electronics in Medicine, as well as the whole field of muscular diseases." He spends about one-third of his time in research, a third in teaching, ten percent in patient services and fifteen percent in research and training administration which he heads. (Tr. p. 166) Dr. Arthur Eberstein spends about one-third of his time respectively in teaching, patient care and research. (Tr. pp. 168-169) Dr. Faro's counsel did not inquire concerning other faculty members referred to in her brief.

The conclusion in appellant's brief at pages 35-36, that the RT-1 book covering the year 1971 (Pl. Exh. 2 c) shows that the Department of Rehabilitation Medicine is primarily a research department is unfounded. An examination of the document indicates that the first 78 projects listed are student training projects and 83 are research projects with numerous of the latter projects directly related to patient care. The appellant's brief similarly overlooks the fact that while numerous members

of the faculty of the Department of Rehabilitation Medicine are engaged in research and receive some compensation from grants and other special funds they are engaged directly in patient care and teaching in the Department which are the primary functions of the Medical Center's hospitals and schools. Dr. Faro has never been involved in patient care and has never taught in the Department of Rehabilitation Medicine. There is nothing in the record to substantiate Dr. Faro's contention that a different criterion was applied in granting tenure to men in the Department of Rehabilitation Medicine (the vast majority of whom are Medical Doctors - P. Exh. 9 pp. 80-82) than to Dr. Faro or other female employees. In spite of appellant's attempt to suggest otherwise (Brief pp. 38-39) the record clearly indicates that certain of the male Ph.D.'s in the Department of Rehabilitation Medicine whom she has singled out as being in the tenure chain or having received tenure in the past were only partly compensated from research funds (Tr. p. 192) and all were engaged in teaching in that Department. All of Dr. Faro's activities in the Department of Rehabilitation Medicine, by contrast, were confined to and supported by sponsored research, with no teaching. The teaching she did outside the Department was of limited duration and far short of that necessary to qualify her for tenure.

The appellant's argument that the District Court failed to consider this evidence is likewise unfounded. The court found that Dr. Faro's appointments from 1965 through 1970-71 specifically provided that her compensation was "paid from special funds", and that "From 1965 to the Fall of 1970, the plaintiff did only research work." (Op. p.2) The court also discussed this tenure claim at some length (Op. pp. 15-16) and found that Dr. Faro was not in the tenure line under the University's rules and also (Op. p. 6) "it is uncontroverted that she did no teaching in that department" (i.e. Rehabilitation Medicine).

Dr. Faro attempts to draw unfounded conclusions from comparisons of two Medical School Bulletins (Pl. Exh. 9 and Def. Exh. Z). At page 19 of appellant's brief it is stated that the University appointed three Assistant Professors to the Department of Cell Biology in 1973 while plaintiff was negotiating for a position in that Department. While these documents are in evidence there was no testimony with respect to these employees and the fact is that the faculty members in question are teachers of Cell Biology and not Anatomy. Dr. Faro does not anywhere claim to have any background, training or expertise as a teacher, in Cell Biology.

CONCLUSION

The District Court's denial of the preliminary injunction was based upon the appropriate standard and was fully supported by the evidence. There is no basis for a finding that the lower court's determination constituted an abuse of discretion and it should accordingly be affirmed.

Dated: New York, New York
March 21, 1974

Respectfully submitted

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Isaac D. Rothman.....being duly sworn, says that on the *22nd* day of *March*....., 1974, he served *2 copies*..... of the annexed *Bruf*..... upon *Paul Employment Opportunity Commission*..... Esq., the attorney for the *Amicus Curiae*..... herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at 150 Christopher Street, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. *1800 E Street, N.W.*..... in the *Borough of Washington, D.C., City of New York*, being the address within the State therefore designated by *him* for that purpose.

Isaac D. Rothman.....

Sworn, to before me, this
22nd day of *March*.....
MILTON C. WINKLER *1974*
Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1974

